UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

EARL RUSSELL HORNE, JR.,	)	
Complainant	)	
	)	8 U.S.C. § 1324b Proceeding
v.	)	Case No. 96B00106
	)	
TOWN OF HAMPSTEAD,	)	
Respondent	)	

DECISION AND ORDER DISMISSING COMPLAINT
(January 17, 1997)

MARVIN H. MORSE, **Administrative Law Judge**

Appearances: John B. Kotmair, Jr., on behalf of Complainant.
Thomas J. Gisriel, and Steven B. Schwartzman, Esq.
on behalf of Respondent.

I. Procedural History

On September 11, 1996, a Complaint was filed in the Office of the Chief Administrative Hearing Officer (OCAHO) on behalf of Earl R. Horne, Jr. (Horne or Complainant), against the Town of Hampstead, Maryland (Hampstead). The Complaint alleges that Hampstead discriminated against Horne, a United States citizen, in violation of 8 U.S.C. § 1324b, and that in October 1988 he "applied for or worked" for Hampstead as a "Town Police Officer." Horne does not allege that he was denied employment or that he was discharged from employment.

The allegations in this case essentially reiterate those in Horne v. Town of Hampstead, OCAHO Case No. 96B00050, a case dismissed without prejudice by Order dated August 9, 1996 upon request of Horne, the Complainant in both dockets. 6 OCAHO 884 (1996). Horne's request for dismissal without prejudice was granted in accord with Fed. R. Civ. P. 41(a)(1)(i) prior to the filing of an Answer to the Complaint. Because the history of that proceeding is detailed in that Order, it is sufficient to incorporate it by reference, referring to it below to the extent necessary to disposition of the present case.

Horne initiated Docket No. 96B00050 by filing a charge in the Office of Special Counsel for

Immigration-Related Unfair Employment Practices (OSC) which cited, as Hampstead's unfair employment practice, an October 15, 1994 letter which "finally refused to honor" Horne's "statement of Citizenship . . . wherein he claimed not to be subject to the withholding of income taxes since he is a citizen of the United States." Charge dated 12/15/95 at ¶ 9.

The two Complaints, consisting of entries on the OCAHO complaint format, are substantially similar but differ in certain material respects, notably that in the earlier docket, at ¶¶ 8 and 9 of his OCAHO complaint, Horne alleged national origin and citizenship status discrimination while specifying only citizenship status discrimination in the new Complaint.

In both iterations, however, the inquiry at ¶ 13, "I was knowingly and intentionally not hired" is answered in the negative, and the entry at ¶ 13a is blank:

> I was not hired because of my:
> ____ citizenship status
> ____ national origin
> ____ citizenship status AND national origin.

In both filings also,

- at ¶ 13, where Complainant is asked whether he "was knowingly and intentionally not hired," the choice between "yes" and "no" is answered in the negative;

- at ¶ 14, where Complainant is asked whether he "was knowingly and intentionally fired," the choice between "yes" and "no" is answered in the negative;

- at ¶ 16, where Complainant is asked whether Hampstead "refused to accept the documents that I presented to show I can work in the United States," the choice between "yes" and "no" is answered in the positive;

- at ¶ 17, where Complainant is asked whether Hampstead "asked me for too many or wrong documents than required to show that I am authorized to work in the United States," the choice between "yes" and "no" is answered in the negative;

- at ¶ 18, the date entered for having "filed a charge with [OSC]" is December 16, 1995;

- at ¶ 19, Complainant responds affirmatively to the question whether OSC sent

him a letter advising that he could file a complaint in OCAHO;

- at ¶¶ 20 and 21, Complainant asserts a demand for back pay from

"10 / 6 / 94
Day Month Year."

In both complaints, Horne alleges document abuse, contending in the new case at ¶ 16 that Hampstead "refused to accept the documents that I presented to show I can work in the United States." In response to the inquiry at ¶ 16 as to Hampstead's refusal "to accept the following documents," i.e., a "Statement of citizenship" and an "Affidavit of Constructive Notice," the Complaint, varying slightly from the claim in the prior case, recites that,

> Both documents assert Constitutional Rights of a U.S. citizen as secured by statute, so that Citizens are not Treated as Aliens for any employment practice so that the U. S. Citizen is given 100% of his payment for his labor unencumbered by any Congressional Act.

Horne's Complaint is signed in his stead by John Kotmair, Jr. (Kotmair) under date of September 5, 1996 pursuant to an "attached Power of Attorney," by which Horne gives Kotmair "in his position of Director of National Workers Rights Committee or any of his designees," permission to take certain actions, including representation before "the [OSC,] . . . OCAHO, and in any proceeding before an Administrative Law Judge in OCAHO." The Complaint is accompanied also by a letter of transmittal from Kotmair to OCAHO dated September 4, 1996.

Referring to the OSC right-to-file an OCAHO complaint letter, there is a bold-print caveat in the OCAHO complaint format at ¶ 19:

"**IMPORTANT: YOU MUST ATTACH A COPY OF THIS LETTER**"

Consistent with the OCAHO caveat, the Complaint in Docket No. 96B00050 was accompanied by an undated OSC letter addressed to Kotmair, listing the Horne charge among others. OSC stated that it had determined--as to charges by all the named individuals--that "there is no reasonable cause to believe that [the injuries alleged] state a cause of action" of citizenship status or national origin discrimination under 8 U.S.C. § 1324b, or of document abuse under 8 U.S.C. § 1324b(a)(6). As to Horne, OSC's additional conclusion that the charges "were not timely filed," was presumably measured by the interval between the claim in his charge that the unfair practice occurred on October 15, 1994, and December 1995 when he filed his charge, a period in excess of the 180 days prescribed by statute for filing such charge. 8 U.S.C. § 1324b(d)(3). Horne's present filing is more than 90 days after receipt of the OSC determination letter which certainly preceded the May 14, 1996 filing of the complaint in the prior docket. 8 U.S.C. § 1324b(d)(2).

Complainant in the present case did not file a charge with OSC before filing his OCAHO Complaint. Instead, the Kotmair transmittal letter refers to a "re-filing," asserting reliance on withdrawal of the prior complaint without prejudice, and failure by the Department of Justice "to

apply the unwritten policy to waive the 180 day filing deadline requirement," since Horne "did originally file his complaint with the EEOC [Equal Employment Opportunity Commission]."

On October 9, 1996, Hampstead filed a timely answer to the Complaint, denying liability and asserting numerous affirmative defenses, including, *inter alia*, failure of Complainant to have first filed the requisite charge with OSC.

II. Analysis and Ruling

This proceeding raises two issues not previously addressed in OCAHO jurisprudence:

(a) assertion in a private action under 8 U.S.C. § 1324b(d)(2) by an individual against an employer with whom there is a continuing employment relationship of a claim of citizenship status discrimination in violation of § 1324b(a)(1), and a claim of overdocumentation (document abuse) in violation of § 1324b(a)(6) which fails to implicate the employment eligibility verification system, and

(b) the filing of a complaint without first filing a charge with OSC under a claim of prior filing in a proceeding which resulted in voluntary dismissal of the complaint without prejudice.

(a) Subject Matter Jurisdiction Is Lacking

A complaint of citizenship status discrimination which fails to allege either discriminatory refusal to hire or discriminatory discharge is insufficient as a matter of law. Failure to allege injury compels a finding of lack of subject matter jurisdiction. This is so because the power of the administrative law judge is limited to discriminatory failure to hire and to discharge and does not include conditions of employment.

An incumbent employee alleging that an employer refused to accept proffered documents to show work eligibility, who specifies documents which from the face of the complaint are not documents lawfully cognizable by the employment eligibility verification system, while denying that the employer asked for too many or wrong documents to show work authorization, fails also to state a cause of action under 8 U.S.C. § 1324b.

The issue of subject matter jurisdiction "may be raised at any time, even on appeal, even by the court *sua sponte*." Capitol Credit Plan of Tennessee v. Shaffer, 912 F.2d 749, 750 (4th Cir. 1990) (citing Mansfield, Coldwater & Lake Railway Co. v. Swan, 111 U.S. 379, 382 (1884)).

A court's first duty is to determine subject matter jurisdiction because "lower federal courts are courts of limited jurisdiction, that is, with only the jurisdiction which Congress has prescribed." Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 376 (1940). "It is always incumbent upon a federal court to evaluate its jurisdiction *sua sponte*, to ensure that it does not decide controversies beyond its authority." Davis v. Pak, 856 F.2d 648, 650 (4th Cir. 1988) (citing Johnson v. Town of Elizabethtown, 800 F.2d 404, 407 n.2 (4th Cir. 1986)). "[L]ack of subject matter jurisdiction is an issue that requires *sua sponte* consideration when it is seriously in doubt." Cook v. Georgetown Steel Corp., 770 F.2d 1272, 1274 (4th Cir. 1985). Parties cannot confer jurisdiction by consent. McCorkle v. First Pennsylvania Banking & Trust Co., 459 F.2d 243, 244 n.1 (4th Cir. 1972). "If the court perceives the defect, it is obligated to raise the issue *sua sponte*." Id.

The forum cannot expand or constrict the jurisdiction conferred on it by statute. Willy v. Coastal Corp., 503 U.S. 131, 135 (1992). Courts therefore have the authority "to determine whether or not they have jurisdiction to entertain [a] cause and for this purpose to construe and apply the statute under which they are asked to act." Chicot, 308 U.S. at 376.

The Supreme Court has instructed that federal administrative law judges are "functionally comparable" to Article III judges. Butz v. Economou, 438 U.S. 478, 513 (1978). To the extent that reviewing courts characterize the Article III trial bench as a court of limited jurisdiction, the administrative law judge is *a fortiori* a judge of limited jurisdiction subject to identical jurisdictional strictures.

(1) Lack of a Citizenship Status Discrimination Cause of Action

Refusal to hire or discharge are the only citizenship status discrimination claims cognizable under § 1324b. The entries, *seriatim*, on Horne's OCAHO complaint format, as well as the tenor of pleadings in the prior case indicate an ongoing employment relationship, as confirmed by the first sentence of Kotmair's September 4, 1996 letter to OCAHO transmitting the Complaint, i.e., the "re-filing of his complaint against his employer the Town of Hampstead." (Emphasis supplied). The employment is confirmed also in Kotmair's letter of September 4, 1996, responding to the August 9, 1996 Order in Docket No. 96B00050. That letter, dated the same day as the transmittal in the new docket, recites that "Mr. Horne is a Police Officer with the Town of Hampstead."[1] Nothing in the complaint or any pleading in either docket suggests that Horne was either refused employment or discharged by Hampstead.

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[1] Compare ¶ 20 of the Complaint where Complainant requests back pay. As a matter of law, however, an employee who continues on the payroll is barred from back pay. See 8 U.S.C. § 1324b(g)(C) ("No order shall require . . . payment to an individual of any back pay, if the individual was refused employment for any reason other than discrimination on account of national origin or citizenship status.")

It is established OCAHO jurisprudence that administrative law judges have § 1324b citizenship status jurisdiction only in those situations where the employee has been discriminatorily rejected or not hired. Title 8 U.S.C. § 1324b does not reach conditions of employment. Naginski v. Department of Defense, et al., 6 OCAHO 891 at 29 (1996) (citing Westendorf v. Brown & Root, Inc., 3 OCAHO 477 at 11 (1993); Ipina v. Michigan Dept. of Labor, 2 OCAHO 386 (1991); Huang v. Queens Motel, 2 OCAHO 364 at 13 (1991)). Controversies over conditions of employment do not confer § 1324b jurisdiction. Id. Here, although Horne remains employed, claiming neither refusal to hire nor wrongful termination, he seeks recourse over his dispute concerning federal tax withholding and social security law compliance.

This proceeding stems from what can at best be characterized as misapprehension that administrative law judge jurisdiction is available to resolve an employee's philosophic or political disagreement with obligations imposed by federal revenue and employment law. Such philosophical and political dispute is beyond the scope of § 1324b. Complainant is in the wrong forum for the relief he seeks. A congressional enactment to provide a remedy which addresses a particular concern does not become a per se vehicle to address all claims of putative wrongdoing. This forum is one of limited jurisdiction, powerless to grant the relief sought by Complainant. I am unaware of any theory on which to posit § 1324b jurisdiction that turns on requests by an employer for a social security number or execution of tax withholding forms. Horne's gripe is with the internal revenue and social security prerequisites to employment in this country, not with immigration law. The Complaint must be dismissed for lack of subject matter jurisdiction.

Section 102 of the Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359 (Nov. 6, 1986), enacted a new antidiscrimination cause of action, amending the Immigration and Nationality Act (INA) by adding a Section 274B, codified as 8 U.S.C. § 1324b. Section 102 was enacted as part of comprehensive immigration reform legislation, to accompany Section 101 which, codified as 8 U.S.C. § 1324a, forbids an employer from hiring, recruiting, or referring for a fee, any alien unauthorized to work in the United States. Section 1324b was intended to overcome the concern that, as a result of employer sanctions compliance obligations introduced by § 1324a, people who looked different or spoke differently might be subjected to consequential workplace discrimination.[2]

President Ronald Reagan in his formal signing statement observed that "[t]he major purpose of Section 274B is to reduce the possibility that employer sanctions will result in increased national origin and alienage discrimination and to provide a remedy if employer sanctions enforcement does have this

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[2]See "Joint Explanatory Statement of the Committee of Conference," Conference Report, IRCA, H.R. Rep. No. 99-1000, 99th Cong., 2d Sess., at 87 (1986), reprinted in 1986 U.S. Code Cong. & Admin. News 5840, 5842.

result."[3] As understood by the EEOC (Notice No.-915.011, Responsibilities of the Department of Justice and the EEOC for Immigration-Related Discrimination (Sept. 4, 1987)):

> [c]onsistent with its purpose of prohibiting discrimination resulting from sanctions, [§ 1324b] only covers the practices of hiring, discharging or recruitment or referral for a fee. It does not cover discrimination in wages, promotions, employee benefits or other terms or conditions of employment as does Title VII.

See Tal v. M.L. Energia, Inc., 4 OCAHO 705, at 14 (1994) (as amended in 1990 to add § 1324b(a)(6), § 1324b relief is limited to "hiring, firing, recruitment or referral for a fee, retaliation and document abuse").

Section 101 of IRCA, 8 U.S.C. § 1324a, makes it unlawful to hire an individual without complying with certain employment eligibility verification requirements. 8 U.S.C. §§ 1324a(b). As implemented by the Immigration and Naturalization Service, the employer must check the documentation of all employees hired after November 6, 1986, and complete an INS Form I-9 within a specified period of the date of hire. The employee must produce documentation establishing both identity and employment authorization.

The employment verification system established under § 1324a provides a comprehensive scheme which stipulates categories of documents acceptable to establish identity and work authorization. 8 U.S.C. § 1324a(b) and 8 C.F.R. § 274a.2(b)(1)(v). When an employer hires an individual, the latter must sign an INS Form I-9 certifying his or her eligibility to work and that the documents presented to the employer to demonstrate the individual's identity and work eligibility are genuine. The employer signs the same form, indicating which documents were examined, and attests that they appear to be genuine and appear to relate to the individual who was hired. List A documents can be used to establish both work authorization and identity. List B documents establish only identity and List C documents establish only employment eligibility. Employees who opt to use List B and List C documents to complete the I-9 process must submit one of each type of document. Only those

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[3]Statement by President Reagan Upon Signing S. 1200, 22 WEEKLY COMP. PRES. DOCS. 1534, 1536 (Nov. 10, 1986). See Williamson v. Autorama, 1 OCAHO 174, at 1173 (1990), 1990 WL 515872 ("Although a Presidential signing statement falls outside the ambit of traditional legislative history, it is instructive as to the Administration's understanding of a new enactment"). Accord, Kamal-Griffin v. Cahill Gordon & Reindel, 3 OCAHO 568, at 14, n. 11 (1993), 1993 WL 557798. [Citations to OCAHO precedents in bound Volume I, (Continued) Administrative Decisions Under Employer Sanctions and Unfair Immigration-Related Employment Practices Laws, reflect consecutive decision and order reprints within that bound volume; pinpoint citations to pages within those issuances are to specific pages, seriatim, of Volume I. Pinpoint citations to OCAHO precedents in volumes subsequent to Volume I, however, are to pages within the original issuances.]

documents listed may be used.

The employee completing the I-9 process is free to choose which among the prescribed documents to submit to establish identity and work authorization. Upon verifying the documents, the employer must accept any documents presented by the employee which reasonably appear on their face to be genuine and to relate to the person presenting them. The Immigration Act of 1990 amended the INA to clarify that the employer's refusal to accept certain documents or demand that the employee submit particular documents in order to complete the Form I-9 violates IRCA's antidiscrimination provisions. See Immigration Act of 1990, P.L. 101-649, 104 Stat. 4978 (Nov. 29, 1990), as amended by The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), P.L. 104-208, 110 Stat. 3009 (Sept. 30, 1996); 8 U.S.C. § 1324b(a)(6).

In sum, § 1324b and the administrative enforcement and adjudication modalities authorized to execute and adjudicate the national policy it evinces are not sufficiently broad to address Complainant's attacks on the tax and the social security systems. Nothing in his pleadings engages the employment eligibility verification system. Where § 1324b has been held to be available to address citizenship status discriminaton without implicating the I-9 process, the aggrieved individual was found to have been treated differently from others, and, unlike Horne, consequently discriminatorily denied employment. United States v. Mesa Airlines, 1 OCAHO 74, at 466, 467 (1989).

The pleadings in this case as understood in light of the filings in the prior docket fail to disclose that Hampstead requested Horne to produce a social security card either in connection with preparation of section 2 of a Form I-9 or at all. See Westendorf v. Brown & Root, Inc., 3 OCAHO 477, at 10 (1993). There is nothing in the text or legislative history of IRCA to suggest that an employer is prohibited from asking for a social security number. Lewis v. McDonald's Corp., 2 OCAHO 383, at 5 (1991). Patently, Horne's disagreement over employee obligations is outside the scope of administrative law judges. Horne was neither denied employment, nor discharged. Accordingly, there is no basis on which to posit § 1324b citizenship status discrimination.

(2) The Overdocumentation Cause of Action Is Deficient

Jurisdiction over document abuse can only be established by proving that the employer requested specific documents "for purposes of satisfying the requirements of section 1324a(b)." 8 U.S.C. § 1324b(a)(6). Nothing in the case before me suggests that the tender of documents identified by Complainant at ¶ 16a of his Complaint implicates § 1324a(b) requirements. Patently, the Complaint negates any inference that Complainant was either denied employment or was discharged for failure to satisfy requirements of the employment eligibility verification system established pursuant to 8 U.S.C. § 1324a. The documents Horne insists should have been accepted by the employer are not acknowledged as acceptable by or embraced by that system. He disclaims at ¶ 17 that the employer asked for wrong or different documents than those required to show work authorization, denying in effect that he was the victim of document abuse in violation of § 1324b(a)(6). The recent holding in

Lee v. Airtouch Communications, 6 OCAHO 901, at 13 (1996), is particularly apt:

> [t]he prohibition against an employer's refusal to honor documents tendered . . . refers to the documents described in § 1324a(b)(1)(C) tendered for the purpose of showing identity and employment authorization. Because neither of the documents [Complainant] asserts that [Respondent] refused to accept is a document acceptable for these purposes, and, moreover, because the documents were not offered for these purposes, the complaint fails to state a claim upon which relief may be granted as to the allegations of refusal to accept documents appearing to be genuine. Cf. Toussaint v. Tekwood Associates, Inc., 6 OCAHO 892 at 18-21 (1996) and cases cited therein.

Because nothing in the Complaint implicates obligations of an employer under § 1324a(b), I lack subject matter jurisdiction over Horne's § 1324b(a)(6) allegations.

(b) The Complaint Fails To State a Cause of Action Cognizable Under 8 U.S.C. § 1324b

Complainant is in error in thinking himself at liberty to manipulate the adjudication system to avoid in a subsequent proceeding whatever evil he perceived might befall him in the first. Had Complainant wished to attack the OSC conclusion that his charge was untimely, he was obliged to do so in that action. He acted at his peril in failing to pursue his claim there. Having elected to withdraw that Complaint, he has filed the new one without satisfying the jurisdictional condition precedent of first filing a charge with OSC. That is a condition commanded by statute, and implemented by regulation. 8 U.S.C. §§ 1324b(b)(1), 1324b(d)(2); 28 C.F.R. §§44.301(b), 44.303(a),(b),(c), 68.4. See Report of the Committee on the Judiciary: "The bill [IRCA] prohibits the filing of a complaint with an ALJ unless a charge has been filed with the Special Counsel within 180 days of the alleged discriminatory activity." H.R. Rep. No. 99-682, 99th Cong., 2d Sess., pt. 1, at 71 (1986). Accord Kupferberg v. University of Oklahoma Health Sciences Ctr., 4 OCAHO 689, at 1 (1994), United States v. Auburn Univ., 4 OCAHO 617, at 1 (1994).

"It is within the power of a . . . [federal] court to dismiss a claim sua sponte; federal question jurisdiction requires the presentation of a 'substantial' federal question." Crosby v. Holsinger, 816 F.2d 162, 163 (4th Cir. 1987) (citing Hagans v. Lavine, 415 U.S. 528, 537-38 (1974)). A claim is insubstantial if "'its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy.'" Id. (quoting Goosby v. Osser, 409 U.S. 512, 518 (1973) (quoting Ex parte Poresky, 290 U.S. 30, 31 (1933), further quoting Hannis Distilling Co. v. Baltimore, 216 U.S.

285, 288 (1910)).

OCAHO Rules of Practice and Procedures (Rules), codified at 28 C.F.R. § 68.1 et seq., provide that for situations not covered by Part 68, the Rules of Civil Procedure for United States District Courts may be used as a general guideline. Accordingly, it is necessary and appropriate to apply Fed. R. Civ. P. 12(b)(6). Dismissal pursuant to Fed. R. 12(b)(6) is appropriate where "it appears beyond doubt that the plaintiff can prove no set of facts to support her allegations." Revene v. Charles County Com'rs, 882 F.2d 870, 872 (4th Cir. 1989) (citing District 28, United Mine Workers of America v. Wellmore Coal Corp., 609 F.2d 1083, 1085 (4th Cir. 1979); Johnson v. Mueller, 415 F.2d 354, 355 (4th Cir. 1969)). It is necessary to resolve the question of jurisdiction where, as here, the Complaint on its face appears not to comport with statutory and regulatory imperatives.

Whether dismissal without prejudice simply revives the former cause of action or requires a new claim subject to conditions precedent as a new cause of action is a question of first impression in OCAHO. It is not, however, a new question for the federal judiciary.

The Order of August 9, 1996 necessarily treated Complainant's "Request for Withdrawal of Complaint" as a voluntary dismissal under Fed. R. Civ. P. 41(a)(1)(i). Complainant seeks to benefit from that disposition, invoking jurisdiction of the administrative law judge by filing a complaint without first filing an OSC charge. We need, therefore, to determine the effect of the voluntary dismissal and to determine whether there is precedent that would allow Complainant to continue his claim from the point where he left off, rather than follow the statutory regime.

"The effect of a voluntary dismissal [under Fed. R. Civ. P. 41(a)(1)(i)] is to render the [dismissed] proceedings a nullity and leave the parties as if the action had never been brought." In re Piper Aircraft Distribution System Antitrust Litigation, 551 F.2d 213, 219 (8th Cir. 1977). A "lawsuit voluntarily dismissed pursuant to Fed. R. Civ. P. 41(a) . . . is treated as if it had never been filed." Beck v. Caterpillar Inc., 50 F.3d 405, 407 (7th Cir. 1995) (emphasis supplied). "[A] voluntary dismissal under Fed. R. Civ. P. 41(a) wipes the slate clean, making any future lawsuit based on the same claim an entirely new lawsuit unrelated to the earlier (dismissed) action." Sandstrom v. ChemLawn Corp., 904 F.2d 83, 86 (1st Cir. 1990).

"[V]oluntary dismissal under Rule 41(a) does not toll the running of the federal statute of limitations." Id. (citing Adams v. Lever Bros. Co., 874 F.2d 393 (7th Cir. 1989)). "If a plaintiff voluntarily dismisses an action without prejudice, it is considered that the suit had never been filed. For purposes of the statute of limitations, the plaintiff receives no credit or tolling for the time that elapsed during the pendency of the original suit. Furthermore, a court may not reinstate a suit after a voluntary dismissal if the statute of limitations has run out in the interim." Ford v. Sharp, 758 F.2d 1018, 1023-24 (5th Cir. 1985).

I am unaware of any authority to the effect that a party obtaining voluntary dismissal may refile

from the point where the prior case left off.

Section 1324b imposes a condition precedent of filing a charge with OSC before seeking review by an administrative law judge. 8 U.S.C. §§ 1324b(b)(1), 1324b(d)(2). Complainant failed to comply with 8 U.S.C. § 1324b(d) and implementing regulations. Whatever the reason the statutory and regulatory imperatives were not followed, Complainant can obtain no benefits in this forum of limited jurisdiction. Failure *in this case* to satisfy the condition precedent of filing a charge with OSC compels rejection of the complaint because the administrative law judge lacks subject matter jurisdiction.

The requirement that a complainant comply with statutory and regulatory conditions precedent to suit is not satisfied by taking initial administrative steps and then abandoning the process. "Exhaustion of administrative relief before resorting to the courts does not require mere initiation of prescribed administrative procedures; they must be pursued to their conclusion." Mackay v. United States Postal Service, 607 F. Supp. 271, 276 (E.D. Pa. 1985). This is also true of a complainant who abandons his claim before an agency has reached a determination. "To withdraw is to abandon one's claim, to fail to exhaust one's remedies. Impatience with the agency does not justify immediate resort to the courts." Rivera v. United States Postal Service, 830 F.2d 1037, 1039 (9th Cir. 1987), cert. denied, Rivera v. Frank, 486 U.S. 1009 (1988), reh'g denied, 487 U.S. 1228 (1988).

A complainant is obliged to follow statutory procedures to the letter of the law. McCarthy v. Madigan, 503 U.S. 140, 144 (1992); Brady Development Co., Inc. v. Resolution Trust Corp., 14 F.3d 998, 1006 (4th Cir. 1994) (statutory administrative scheme unwaivable jurisdictional prerequisite to judicial review); In re Lilly, 76 F.3d 568, 573 (4th Cir. 1996) (statutory language dispositive when determining if administrative remedies have been exhausted).

OCAHO subject matter jurisdiction is lacking where the private action is filed more than 90 days after receipt of the OSC determination letter. 8 U.S.C. § 1324b(d)(2). Complainant did not file a new charge with OSC. Having elected to short cut the mandatory administrative procedure, he therefore could not and did not attach to his new complaint the requisite OSC letter authorizing a private action to initiate this proceeding. It is certain from the tenor of his representative's transmittal and from the text of the new Complaint that this is the same claim as the one he voluntarily dismissed. Having sought and obtained withdrawal of Docket No. 96B00050, Complainant cannot proceed now as though the prior case is effective as the administrative predicate of the second, without confronting the barrier that he is out of time by waiting more than 90 days from receipt of the OSC letter filed in the prior docket. A lawsuit filed within the limitations period, later dismissed pursuant to Fed. R. Civ. P. 41(a), is treated as if never filed. Beck v. Caterpillar, 50 F.3d at 407. "Voluntary dismissal under Fed. R. Civ. P. 41(a) does not toll the running of the federal statute of limitations." Id. (citing Adams v. Lever Bros. Co., 874 F.2d 393 (7th Cir. 1989)).

Equitable Tolling Inapplicable

Equitable tolling is a judicial doctrine, not (as Complainant's representative contends) an unwritten policy. Zipes v. Trans World Airlines, 455 U.S. 385, 393, 395, 398 (1982). Equitable tolling is available where the putative victim of discrimination asserted rights in the wrong forum, was actively misled by the employer, or was prevented in some extraordinary way from exercising his or her rights. Udala v. New York State Dep't of Education, 4 OCAHO 633 (1994); United States v. Weld County School Dist., 2 OCAHO 326, at 17 (1991). Federal courts typically extend equitable relief only sparingly, and not to protect against excusable neglect. Irwin v. Dept. of Veterans Affairs, 498 U.S. 89, 96 (1990); Caspi v. Trigild Corp, 6 OCAHO 838, at 6 (1996).

The attempt in the transmittal letter to obtain equitable tolling of the 90 day period cannot succeed. Even were Complainant appearing pro se, he is ineligible for such relief because failure to comply with the 90 day period of limitations is his fault--not that of the employer or OSC. Moreover, as Horne has been represented at all times relevant, he does not fit within the class of individuals to whom such equitable assistance can be provided.

Complainant refers to the Justice Department's purportedly "unwritten policy" of equitable tolling as a cure for his failure to file his complaint with OSC within the required 180 day statutory period. 8 U.S.C. § 1324b(d)(3); 28 C.F.R. § 68.4(a). In light of sole reliance on the OSC determination letter filed in Docket No. 96B00050 which obviously preceded the filing of the present complaint by more than the statutory 90 day period in which to file the second complaint, he implicitly relies on equitable tolling in that respect as well. § 1324b(d)(2); 28 C.F.R. § 68.4(c).

The 180-day charge filing deadline has been held to be one of limitations, and not jurisdiction, and, therefore, susceptible to equitable tolling of the period of limitations. Udala, 4 OCAHO 633 (citing United States v. Mesa Airlines, 1 OCAHO 74, 461 at 482-84 (1989)). See also Lundy v. OOCL (USA) Inc., 1 OCAHO 215, 1438, at 1445-46 (1990); Ortiz v. Moll-Tex Broadcasting Co., 3 OCAHO 440, at 4 (1992); Halim v. Accu-Labs Research, Inc., 3 OCAHO 474 at 12-15 (1992).

OCAHO caselaw suggests also that the 90 day filing deadline is not jurisdictional, and, therefore, subject to equitable tolling. Briceno-Briceno v. Farmco Farms, 4 OCAHO 629, at 15-16 (1994); Grodzki v. OOCL (USA) Inc., 1 OCAHO 295, at 1951-56 (1991); Williams v. Deloitte & Touche, 1 OCAHO 258, at 1679 (1990).

Applying general principles to the present case, however, equitable tolling is not available to Complainant to relieve him from the 180 day filing deadline. First, Complainant's voluntary dismissal "wiped the slate clean," with no opportunity to short circuit the statutory regimen. I am unaware of any principle which entitles Complainant, having failed to file the mandatory OSC charge for his second complaint, to revive the original OSC charge from his voluntarily dismissed first complaint, much less to equitable relief. Nor is Complainant entitled to relief from failure to file his OCAHO complaint within 90 days after receipt of the OSC determination letter. He was not misled to his detriment with respect to a § 1324b cause of action by OSC or by the employer. Absent a credible basis for equitable tolling,

even a one day delay in filing can defeat administrative law judge jurisdiction. Grodzki, 1 OCAHO 295 at 1951-56 (1991).

Second, and of controlling significance, consonant with federal court caselaw, pertinent OCAHO precedent defeats equitable tolling where, as here, the individual seeking relief is represented. In Lundy v. OOCL (USA) Inc., 1 OCAHO 215 (1990), the complainant retained counsel at the time of his OSC charge, and was represented on his subsequent OCAHO complaint. Lundy rejected equitable tolling as an excuse for failure to file within the statutory time period "where counsel is available to a party." Id. at 1448 (citations omitted). See also Morse v. Daily Press, Inc., 826 F.2d 1351, 1353 (4th Cir. 1987), cert. denied, 108 U.S. 455 (1987) ("Retaining an attorney extinguishes the equitable reasons for tolling . . . "); Salcido v. New-Way Pork Co., 3 OCAHO 425, at 13-14 (1992).

Assuming *arguendo* that Horne might otherwise successfully assert equitable tolling, the power of attorney by which Horne has authorized Kotmair to serve as his representative extinguishes that claim. A complainant must accept the consequences as well as the benefits of representation.

III. Conclusion

(a) Disposition

Complainant's § 1324b claims are animated by a pervasive delusion that creation of new causes of action to achieve the specific, finite policy goal of a discrimination-free workplace can resolve citizen grievances beyond the scope of that goal. Accordingly, as more fully explained above, the Complaint is dismissed with prejudice for lack of subject matter jurisdiction and for failure to state a cause of action on which relief can be granted. All requests not disposed of in this Decision and Order are denied. Accordingly, the Complaint is dismissed. 8 U.S.C. § 1324b(g)(3).

Because my August 9, 1996 Order in the prior case offered certain suggestions and caveats, Horne's representative, Kotmair, asks in effect that I be recused from this case. It is sufficient for me to note in response that neither OCAHO, having assigned this case to me, nor I having retained it, agree with Horne's representative.

(b) Post-Decision Procedure

Hampstead asks in its Answer for an award of attorneys' fees. Fee shifting is authorized by 8 U.S.C. § 1324b(j)(4). I am prepared to consider that request. Compare Williamson v. Autorama, 1 OCAHO 174, at 1172-1175 (1990). Hampstead may file an appropriate motion explaining the rationale for such award together with a sufficient showing on which to premise an accurate and just calculation of attorneys' fees. Hampstead will be expected to allocate the award requested between

this proceeding and the work performed in conjunction with Docket No. 96B00050. Hampstead's filing, if any, is due not later than Tuesday, April 1, 1997. A response by Complainant will be timely if filed not later than Thursday, May 1, 1997.

(c) Deadlines

This Decision and Order is the final administrative order in this proceeding, and "shall be final unless appealed" within 60 days to a United States court of appeals in accordance with 8 U.S.C. § 1324b(i)(1).

SO ORDERED.

Dated and entered this 17th day of January, 1997.

Marvin H. Morse
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of the attached Order Dismissing Complaint were mailed postage prepaid this 17th day of January, 1997, addressed as follows:

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